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Iraq/Kuwait Economic Sanctions: Trade Relations on a War Footing[†]

On August 2, 1990, Iraqi forces invaded the neighboring Persian Gulf state of Kuwait.¹ President George Bush immediately issued two executive orders that froze assets of the Governments of Iraq and Kuwait held in the United States, imposed an embargo on trade between the United States and Iraq, and prohibited other transactions relating to Iraq.² On August 9, 1990, President Bush, seeking to align U.S. Persian Gulf policy with that of the United Nations, issued two superseding executive orders that block assets of the Governments of Iraq and Kuwait and entities owned or controlled by these governments; impose an embargo on trade between the United States, and Iraq and Kuwait; and prohibit several types of transactions conducted by U.S. persons that concern these two

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The authors wish to thank W. Clark McFadden II and James A. Schoettler, Jr. of Dewey Ballantine for their many helpful suggestions.

[†]As this article goes to press, the exiled Kuwaiti Government is returning to power upon the end of the Persian Gulf war. Thus, it appears that at least the Kuwaiti sanctions soon will be rescinded (either incrementally or via one executive action). It is the authors' belief, however, that even to the extent that this article evaluates sanctions which cease to be effective, it remains instructive as to new themes and policies emerging in U.S. economic sanctions.

1. Washington Post, Aug. 3, 1990, at 1, col. 1.

2. Exec. Order 12,722, 55 Fed. Reg. 31,803 (1990) (Iraq); Exec. Order 12,723, 55 Fed. Reg. 31,805 (1990) (Kuwait).

countries.³ Pursuant to authority granted by the executive orders, the Treasury Department's Office of Foreign Assets Control (OFAC) subsequently issued two sets of regulations⁴ that reiterate the prohibitions of the executive orders and contain other provisions intended to give effect to the Bush administration's sanctions policy.

This article analyzes the Iraq/Kuwait sanctions in the context of similar economic sanctions and explores the practical economic effect that these sanctions will have on U.S. persons doing business with Iraq or Kuwait.

I. Summary

The primary vehicles for the implementation of U.S. sanctions policy for Iraq and Kuwait are two very similar sets of regulations issued by OFAC: the Iraqi Sanctions Regulations (the ISRs)⁵ and the Kuwaiti Assets Control Regulations (the KACRs).⁶ As with earlier U.S. sanctions, the principal provisions of the ISRs and the KACRs freeze assets of the target countries. These provisions prohibit transactions concerning property or interests therein of either the Government of Iraq or the Government of Kuwait. The regulations also implement a far-reaching embargo on trade between the United States, and Iraq and Kuwait. Finally, the ISRs and the KACRs prohibit a wide range of transactions with the intent of effecting a complete cessation of all unauthorized economic interactions between Iraq and occupied Kuwait.

The assets freeze and the nonembargo prohibitions apply only to transactions conducted by "U.S. persons," defined to include, *inter alia*, foreign branches of U.S. corporations but not foreign subsidiaries of U.S. corporations. The import and export prohibitions are not limited to U.S. persons but, rather, cover all transactions concerning goods, technology, and services subject to U.S. jurisdiction. U.S. persons who have failed to satisfy contractual obligations as a result of the sanctions are shielded from liability in U.S. courts by an excuse provision of the International Emergency Economic Powers Act, the principal source of authority for the ISRs and the KACRs. In foreign tribunals, performance of contract obligations would appear to be excused in most cases by the doctrine of *force majeure*.

The Iraq/Kuwait sanctions differ from other U.S. economic sanctions programs in two important respects, both of which will affect the administration and

3. Exec. Order 12,724, 55 Fed. Reg. 33,089 (1990) (Iraq); Exec. Order 12,725, 55 Fed. Reg. 33,091 (1990) (Kuwait).

4. Iraqi Sanctions Regulations, 56 Fed. Reg. 2112-23 (1991) (to be codified at 31 C.F.R. pt. 575); Kuwaiti Assets Control Regulations, 55 Fed. Reg. 49,856-869 (1990) (to be codified at 31 C.F.R. pt. 570).

5. 56 Fed. Reg. 2112-23 (1991) (to be codified at 31 C.F.R. pt. 575). Minor amendments to the ISRs and new reporting requirements for a census of frozen assets and claims against the Government of Iraq appear at 56 Fed. Reg. 5636-41 (1991).

6. 55 Fed. Reg. 49,856-869 (1990) (to be codified at 31 C.F.R. pt. 570). Minor amendments to the KACRs appear at 56 Fed. Reg. 5351-52 (1991).

interpretation of the sanctions. First, they include a set of prohibitions, embodied in the KACRs, which were issued to benefit, rather than to punish, the country concerned. The KACRs were established to prevent Iraqi seizure of Kuwaiti assets. Accordingly, the KACRs reflect the U.S. policy of permitting transactions with the legitimate Kuwaiti Government to the extent that no benefit will accrue to Iraq.

Second, unlike past U.S. sanctions, which largely have been unilateral efforts, the Iraq/Kuwait sanctions are an integrated part of a coordinated multilateral program. Thus, the KACRs sometimes recognize authorization for transactions granted by other countries. This coordination with other countries should ameliorate concerns of extraterritorial over-reaching by the United States that have accompanied other U.S. sanctions programs.

II. U.S. Economic Sanctions

With increasing frequency since World War II, the United States has used economic sanctions⁷ as a tool to address foreign policy crises. During most of the twentieth century, emergency economic sanctions have been established primarily under the statutory authority of Section 5 of the Trading with the Enemy Act (TWEA).⁸ Since its enactment in 1977, emergency economic sanctions have been established primarily under the authority of the International Emergency Economic Powers Act (IEEPA).⁹ Emergency economic sanctions are administered by OFAC.

IEEPA authorizes the President, when confronted with an unusual and extraordinary threat, to exercise broad authority over financial transactions and property after first declaring a national emergency. In particular, the President is authorized to investigate, regulate, or prohibit (1) foreign exchange transactions, (2) transfers of credit or payments through any banking institution if such pay-

7. The term "economic sanctions" has been usefully defined as "country-specific economic or financial prohibition[s] imposed upon a target country or its nationals with the intended effect of creating dysfunction in commercial and financial transactions with respect to a specified target, in the service of specified foreign policy purposes." M. MALLOY, *ECONOMIC SANCTIONS AND U.S. TRADE* 13 (1990); *see also* B. CARTER, *INTERNATIONAL ECONOMIC SANCTIONS* 4 (1988).

8. 40 Stat. 415 (1917) (codified at 50 U.S.C. app. § 5), *as amended*. TWEA sanctions include those against North Korea, Vietnam, and Cambodia, *see* Foreign Assets Control regulations, 31 C.F.R. pt. 500 (1990), and those against Cuba, *see* Cuban Assets Control regulations, 31 C.F.R. pt. 515 (1990).

A 1977 amendment restricts the President's authority to invoke TWEA powers to "times of the war." Pub. L. No. 95-223, 91 Stat. 1625, 1626 (1977). IEEPA grants the President largely the same powers as TWEA, a notable exception being the power to expropriate property in which a foreign state or foreign national holds an interest. *Compare* 50 U.S.C. § 1702(a) (IEEPA powers) *with* 50 U.S.C. app. § 5(b)(1) (TWEA powers). Interestingly, the Treasury Department determined that the January 12, 1990, congressional resolution granting the President the authority to use force against Iraq does not constitute a declaration of war that could be used to invoke TWEA. *See* Daily Report for Executives (BNA), Jan. 18, 1991, at A-14.

9. Pub. L. No. 95-223, 91 Stat. 1626 (1977) (codified at 50 U.S.C. §§ 1701-1706), *as amended*.

ments involve the interests of a foreign government or national, and (3) the importation or exportation of currency or securities by any person subject to the jurisdiction of the United States; or to assume complete authority in the regulation of any acquisition, holding, use, transfer, importation, or exportation or any transaction involving any property in which any foreign country or national has an interest.¹⁰ IEEPA sanctions have been issued in response to actions by the governments of Nicaragua,¹¹ South Africa,¹² Libya,¹³ and Panama.¹⁴

Violations of orders, regulations, or licenses issued pursuant to IEEPA are punishable by a civil penalty of \$10,000.¹⁵ Willful violation of IEEPA sanctions is a felony and anyone who willfully violates any license, order, or regulation issued under the Act is subject to up to ten years' imprisonment, a fine of \$50,000, or both.¹⁶ Any officer, director, or agent of a corporation who knowingly participates in such violations may face the same penalties.¹⁷

Economic sanctions are also authorized by the United Nations Participation Act of 1945 (the U.N. Act).¹⁸ Section 5 of the U.N. Act¹⁹ authorizes the President to implement measures passed by the U.N. Security Council pursuant to article 41 of the U.N. Charter, which concerns economic and communications sanctions.²⁰ Section 5 provides for up to a \$10,000 fine, ten years' imprisonment, or both, for willful violations of the orders, rules and regulations issued under the section.²¹ Before the Iraq/Kuwait crisis, the U.N. Act had been used as authority for the issuance of economic sanctions only once pursuant to U.N. resolutions relating to trade with Rhodesia.²²

III. The Iraq/Kuwait Sanctions

A. BACKGROUND

In quick response to the August 2, 1990, Iraqi invasion of Kuwait, the President issued two executive orders that blocked assets of the Governments of Iraq

10. 50 U.S.C. §§ 1701-1702.

11. 31 C.F.R. pt. 540 (1990).

12. *Id.* pt. 545.

13. *Id.* pt. 550.

14. *Id.* pt. 565.

15. 50 U.S.C. § 1705.

16. *Id.*

17. *Id.*

18. Pub. L. No. 264, 59 Stat. 619 (1945) (codified at 22 U.S.C. §§ 287-287e), *as amended*.

19. *Id.* § 5, 59 Stat. at 620 (codified at 22 U.S.C. § 287c), *as amended*.

20. While the U.N. Security Council Resolution on sanctions against Iraq, No. 661, does not identify article 41 itself, it purports to be an action under chapter VII of the U.N. Charter (Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression), which contains article 41.

21. 22 U.S.C. § 287c(b). As with IEEPA, officers, directors, and agents of corporations who knowingly participate in violations may be subject to the same punishments. *See id.* Unlike IEEPA, the U.N. Act also provides for forfeiture of assets used in the course of a violation. *See id.*

22. *See generally* M. MALLOY, *supra* note 7, at 148-59.

and Kuwait held in the United States and prohibited trade and other transactions between the United States and Iraq.²³ According to the administration, the executive order blocking Kuwaiti assets was issued at the request of the legitimate Kuwaiti Government to prevent its assets located in the United States from falling into the hands of the Iraqis.²⁴

On August 6, 1990, the U.N. Security Council issued Resolution 661, which imposed a duty on all U.N. members to:

- prohibit the importation of commodities and products originating in Iraq or Kuwait;
- prohibit activities that promote exports from Iraq or Kuwait and dealings by their citizens in commodities or products originating in Iraq or Kuwait;
- proscribe the sale or supply of commodities or products to any person in Iraq or Kuwait or to any person for the purposes of any business operating from Iraq or Kuwait, and any activities that promote such transactions; and
- prevent the supply of funds or other financial or economic resources to the Government of Iraq or any commercial, industrial, or public utility undertaking in Iraq or Kuwait.

Exceptions were established for exports and payments for medical or humanitarian purposes.

On August 9, 1990, the President issued two executive orders that superseded the August 2 executive orders and modified U.S. sanctions to make them conform more closely to U.N. Resolution 661.²⁵ Essentially identical in form, executive orders 12,724 and 12,725 apply to transactions relating to Iraq and to Kuwait, respectively. These executive orders implemented the sanctions prohibitions much as they now appear in the sanctions regulations. Before the release of the sanctions regulations, OFAC supplemented the executive orders with guidance in the form of letters and a series of general licenses.²⁶

In the days following the Iraqi invasion of Kuwait, most other countries, including all major Western nations, established economic sanctions against Iraq similar to those of the United States.²⁷

B. REGULATIONS

OFAC issued the KACRs²⁸ and the ISRs²⁹ on November 30, 1990, and January 18, 1991, respectively. As with the August 9 executive orders, the principal

23. *Supra* note 2.

24. *See* 55 Fed. Reg. 49,856 (1990).

25. *Supra* note 3.

26. Most of the general licenses which were released before the issuance of the sanctions regulations were integrated into the regulations. *See* 55 Fed. Reg. 49,856 (1990); 55 Fed. Reg. 2112 (1991).

27. *See generally* *Asset Freezing*, INT'L FIN. L. REV., Sept. 1990, 8-15.

28. *Supra* note 6.

29. *Supra* note 5.

statutory authorities for both sets of regulations are IEEPA and section 5 of the U.N. Act.³⁰

Though far-reaching and restrictive, the ISRs are fairly conventional in both form and purpose. The KACRs, on the other hand, while appearing in a form similar to other OFAC sanctions regulations, have been established for an unusual purpose—to protect the assets of a foreign country, here Kuwait. Accordingly, the KACRs must be interpreted consistent with their purpose of protecting Kuwaiti assets from plunder by Iraq despite the possibility that this could lead to divergent readings of substantially identical language in the ISRs and the KACRs.

Both of these sets of regulations differ from previous regulations in another significant respect: they are part of a coordinated multilateral effort. Until this point, U.S. sanctions programs almost exclusively have been unilateral efforts. With the Iraq and Kuwait sanctions programs, the United States has integrated its system of sanctions into the multilateral effort directed by the U.N., and this integration is reflected in the ISRs and the KACRs.³¹

1. *Prohibitions*

The ISRs and the KACRs establish substantially identical prohibitions on conduct that are largely the same as those established in the August 9, 1990, executive orders. The prohibitions fall into three categories: (1) a freeze of assets, (2) a trade embargo, and (3) prohibitions on certain other transactions. The regulations, however, introduce much interpretive language not included in the executive orders. The prohibitions are effective absent a license or other authorization from OFAC.

a. *Freeze of Assets*

The centerpieces of the ISRs and the KACRs are provisions that block assets. Though not forfeited, blocked assets are removed from the owner's (or any other person's) access absent OFAC authorization. The assets freeze provisions state that no property, or interests therein, of the Government of Iraq³² or the Gov-

30. See 55 Fed. Reg. 49,857 (1990); 56 Fed. Reg. 2113 (1991).

31. OFAC officials prepared the ISRs and the KACRs after consulting with their counterpart officials from other countries in an attempt to make them harmonize with the sanctions of other countries. See Daily Report for Executives (BNA), Aug. 28, 1990, at A-6.

32. The "Government of Iraq" is defined to include:

- (a) The state and the Government of Iraq, as well as any political subdivision, agency, or instrumentality thereof, including the Central Bank of Iraq;
- (b) Any partnership, association, corporation, or other organization substantially owned or controlled by the foregoing;
- (c) Any person to the extent that such person is, or has been, or to the extent that there is reasonable cause to believe that such person is, or has been, since the effective date, acting or purporting to act directly or indirectly on behalf of any of the foregoing; and

ernment of Kuwait that are now, or hereafter come, within the United States, or that are now, or hereafter come, within the possession or control of a United States person,³³ "may be transferred, paid, exported, withdrawn or otherwise dealt in."³⁴ This is standard language for sanctions regulations issued by OFAC.³⁵

A principal way in which U.S. sanctions have achieved their noted breadth of scope is through broad interpretation of assets freeze provisions. Of particular importance is the meaning of "interests in property." As do other sanctions regulations, the ISRs and the KACRs define "interest" when used with respect to property as "an interest of any nature whatsoever, direct or indirect."³⁶ "Property" and "property interest" are also defined very broadly.³⁷

Courts have held that for the purposes of U.S. economic sanctions, the definition of "interest in property" is wider than the definition the phrase receives in the context of traditional property law.³⁸ A target country interest exists in property located in the United States to which the target country has a contingent

(d) Any other person or organization determined by the Director of the Office of Foreign Assets Control to be included within this section.

KACRs § 570.306; ISRs § 575.306. The "Government of Kuwait" is given a substantially identical definition. KACRs § 570.307.

33. The regulations define "United States person" or "U.S. person" as "any United States citizen; permanent resident alien; juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; or any person in the United States." *Id.* § 570.321.

34. The frozen Kuwaiti assets consist principally of bank deposits, debt and equity securities, and real estate; these assets are valued in the billions of dollars by OFAC. The frozen Iraqi assets consist primarily of bank deposits and blocked oil payments; these assets are valued at approximately \$1 billion by OFAC. Remarks prepared for presentation to the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Consumer Protection and Competitiveness, February 21, 1991 [hereinafter Prepared Remarks, R. Newcomb, OFAC].

35. Compare, e.g., Iranian Assets Control Regulations, 31 C.F.R. § 535.201 (1990).

36. KACRs § 570.308; ISRs § 575.308. Accord, e.g., Libyan Sanctions Regulations, 31 C.F.R. § 550.315 (1990).

37. The regulations provide that:

The terms "property" and "property interest" include, but are not limited to, money, checks, drafts, bullion, bank deposits, savings accounts, debts, indebtedness, obligations, notes, debentures, stocks, bonds coupons, any other financial instruments, banker's acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, letters of credit any documents relating to any rights or obligations thereunder, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendor's sales agreements, land contracts, leaseholds, ground rents, real estate and any other interest therein, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks or copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, services of any nature whatsoever, contracts of any nature whatsoever, and any other property, real, personal or mixed, tangible or intangible, or interest or interests therein, present, future or contingent.

KACRs § 570.315; ISRs § 575.315.

38. See M. MALLOY, *supra* note 7, at 299.

contractual claim,³⁹ and in property that has left the target country and passed through the hands of third-country nationals.⁴⁰ Such a broad interpretation is borne out in the ISRs and KACRs. Absent authorization, property that is transferred or subject to an attempted transfer to the Government of Iraq or the Government of Kuwait is deemed to carry an interest of that Government.⁴¹ Further, the regulations provide that the assets freeze provisions can apply to offshore transactions conducted by U.S. persons such as the importation into third countries of goods of Iraqi or Kuwaiti origin.⁴² The Iraqi or Kuwaiti interest in the goods remains after the goods leave Iraq or Kuwait.

The regulations do place certain limits on the meaning of a target country interest in property. Generally, if an authorized transaction results in the transfer of property from Iraq or Kuwait, the Government of Iraq or the Government of Kuwait will no longer be deemed to have an interest in the property.⁴³ Furthermore, interpretive provisions state that the Government of Iraq or the Government of Kuwait will not be perceived as having an interest in goods that were manufactured, consigned, or destined for export to Iraq or Kuwait if the Government of Iraq or the Government of Kuwait never held or received title to the goods on or after August 9, 1990, and if any payment received for the goods is placed in a blocked account.⁴⁴

Also, as part of the effort to coordinate with other countries, a transfer to or from the Government of Kuwait (but not the Government of Iraq) that does not involve a U.S. person "shall be recognized for the purposes" of the assets freeze section if the transfer complied with host country implementation of applicable U.N. Security Council resolutions (that is, Resolution 661) and was otherwise lawful in the host country.⁴⁵ An accompanying example indicates that, pursuant to this provision, the Government of Kuwait will no longer be deemed to retain an interest in goods that have left Kuwait if the goods have been the subject of a transaction that was lawful in a country that at the time maintained appropriate implementation of Resolution 661.⁴⁶

U.S. persons holding funds subject to the assets freeze are compelled to place the funds in an interest-bearing "blocked account" in a U.S. financial institu-

39. See *Behring Int'l, Inc. v. Miller*, 504 F. Supp. 552, 557 (D.N.J. 1980) (applying The Iranian Assets Control regulations).

40. See *United States v. Broverman*, 180 F. Supp. 631, 636 (S.D.N.Y. 1959) (applying the Foreign Assets Control regulations).

41. KACRs § 570.403; ISRs § 575.403.

42. See KACRs § 570.408; ISRs § 575.408. These interpretations of the asset freeze provisions apply equally to the prohibitions on dealing with goods of Iraqi and Kuwaiti origin. See *id.*

43. KACRs § 570.403(a); ISRs § 575.403(a).

44. *Id.* §§ 570.413; ISRs § 575.413.

45. KACRs § 570.201(c).

46. *Id.* § 570.201(d).

tion.⁴⁷ Persons are forbidden to debit a blocked account to make payments on obligations—even obligations that arose before the effective date of the assets freeze, August 2, 1990.⁴⁸

b. Trade Embargo

i. *Import Prohibitions.* Each set of regulations contains two provisions that implement a trade embargo on Iraq and Kuwait. The first prohibits the importation into the United States of goods or services of Iraqi and Kuwaiti origin and also prohibits U.S. persons from taking action that promotes or is intended to promote such importation.⁴⁹ The prohibitions apply to imports from third countries of goods manufactured from Iraqi or Kuwaiti origin raw materials or components regardless of the fact that such raw materials or components have been substantially transformed by virtue of the manufacturing process.⁵⁰ Also, the regulations prevent the importation of Iraqi and Kuwaiti origin goods for transshipment or transit to other countries.⁵¹ An interpretative provision of the KACRs suggests (but does not explicitly state) that the KACRs import prohibition applies only to Kuwaiti origin goods that were exported from either Kuwait or Iraq after the effective date of the prohibition, August 9, 1990.⁵²

ii. *Export Prohibitions.* The second embargo provision states that “no goods, technology (including technical data or other information), or services may be exported from the United States, or, if subject to U.S. jurisdiction, exported or reexported from a third country to [Iraq/Kuwait], to any entity owned or controlled by the Government of [Iraq/Kuwait], or to any entity operated from [Iraq/Kuwait].”⁵³ The export prohibitions have three components.

47. See KACRs §§ 570.203, 570.301; ISRs §§ 575.203, 575.301. In February 1991 OFAC established a one-time reporting requirement for U.S. nationals holding assets of the Government of Iraq as a census of Iraqi blocked assets. See 56 Fed. Reg. 5636–39 (1991). The aggregate size of Iraqi blocked assets had been the subject of much speculation especially because of the potential use of the pool to satisfy claims against Iraq arising from Iraq’s occupation of Kuwait. See Daily Report for Executives, Feb. 11, 1991, at A-8; *infra* section III.C (census of the claims of U.S. persons against the Government of Iraq). The frozen Iraqi assets are valued at approximately \$1 billion by OFAC. Prepared Remarks, R. Newcomb, OFAC, *supra* note 34.

48. KACRs §§ 570.404; ISRs § 575.404.

49. KACRs § 570.204; ISRs § 575.204.

50. KACRs § 570.410(a); ISRs § 575.410.

51. KACRs § 570.409(b); ISRs § 575.409(b).

52. See KACRs § 570.410(b). Limiting the import prohibition to goods that left the target country after the effective date would help ameliorate enforcement difficulties with respect to shipments of fungible goods, such as oil, for which it can be very difficult to determine the country of origin. Note that the prohibitions on dealings in Iraqi and Kuwaiti property, KACRs § 570.206 and ISRs § 575.206, are limited to property that left these countries after the effective date of these prohibitions, Aug. 9, 1990.

53. KACRs § 570.205; ISRs § 575.205. Though not stated clearly in any official publication, it appears that the export control authority of the sanctions supersedes that of the Export Administration Regulations (EAR), 15 C.F.R. pts. 768–799, which are promulgated and administered by the U.S. Commerce Department under the authority of the Export Administration Act, 50 U.S.C. app. §§ 2401 *et seq.* Cf. Exec. Order 12,724, § 5, 55 Fed. Reg. 33,089 (1990); Exec. Order 12,725, § 5,

First, they prohibit the export of goods, technology, or services from the territorial United States to Iraq and Kuwait or to an Iraqi or Kuwaiti entity. Second, because the participation by a U.S. person in the transaction would confer U.S. jurisdiction, the export prohibitions forbid U.S. persons to export goods, technology, or services from any location to Iraq or Kuwait or to an Iraqi or Kuwaiti entity.⁵⁴

Third, unlike other OFAC sanctions, the export prohibitions explicitly cover exports and reexports from third countries.⁵⁵ The language of limitation, that the export must be "subject to U.S. jurisdiction," is not defined in the regulations.⁵⁶ While the executive orders that authorize the sanctions regulations suggest that the sanctions export prohibitions proscribe only third-country exports covered by previously existing U.S. export controls,⁵⁷ the sanctions regulations have left this issue far less clear.

Interpretive provisions of the sanctions regulations do give guidance on when a U.S. person can be liable under the export prohibitions for exports that are diverted or reexported to Iraq or Kuwait. The regulations forbid exports from the United States to third-countries if the exporter knows or has reason to know that the exported commodity is intended for transshipment to Iraq or Kuwait.⁵⁸

55 Fed. Reg. 33,091 (1990). Thus, if recent practice relative to OFAC sanctions is followed, OFAC specific licenses issued under the KACRs and the ISRs will satisfy the requirements of the EAR for the purposes of exports covered by the OFAC license. Cf. 15 C.F.R. § 790.7(c) (OFAC licenses covering exports to Libya satisfy EAR licensing requirements). It is likely, however, that Commerce Department controls apply to exports that OFAC removes from the scope of the prohibitions of the ISRs and the KACRs through, e.g., general licenses. The relationship between the sanctions and other U.S. export controls such as the International Traffic in Arms Regulations, 22 C.F.R. pts. 120–130, promulgated and administered by the U.S. State Department under the Arms Export Control Act, 22 U.S.C. § 2778, is less clear. In sum, the issue of interagency export control jurisdiction in this area is unsettled, fluid, and responsive to rapidly changing Persian Gulf developments.

54. On the jurisdictional concept of the "U.S. person," see *infra* notes 77–81 and accompanying text.

55. Other U.S. export prohibitions sanctions cover only exports from the territorial United States. See, e.g., 31 C.F.R. § 550.202 (Libyan Sanctions Regulations); 15 C.F.R. § 790.7 (Commerce Department general order indicating that while exports to Libya are governed under the Treasury Department's Libyan Sanctions Regulations, 31 C.F.R. pt. 550, reexports to Libya would continue to be governed under the Export Administration Regulations, 15 C.F.R. pts. 668–799).

56. For traditional interpretations of the extent of U.S. extraterritorial jurisdiction, see generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §§ 402, 403 and accompanying comments and reporters' notes [hereinafter RESTATEMENT (THIRD)].

57. See Exec. Order 12,724, § 2(b), 55 Fed. Reg. 33,089 (1990); Exec. Order 12,725, § 2(b), 55 Fed. Reg. 33,091 (1990) (export prohibitions proscribe exports "either (i) from the United States, or (ii) requiring the issuance of a license by a Federal agency"). Export Administration regulations controls on third-country exports are located at, e.g., 15 C.F.R. §§ 774, 776.12, 779.8.

58. KACRs § 570.411(a); ISRs § 575.411. These two provisions are not identical; as indicated below, KACRs § 570.411(a) suggests that as to products that are eventually shipped to Kuwait, liability generally will not lie if the export is "substantially transformed or incorporated into manufactured products in a third country." Also, the export prohibitions prevent one from importing for

Furthermore, exports intended specifically for incorporation or substantial transformation into third country products are prohibited if the product is to be used in Iraq or Kuwait, if the product is being manufactured to fill an Iraqi or Kuwaiti order, or if the manufacturer's sales of the product are predominantly to Iraq or Kuwait.⁵⁹

The ISRs effectively prevent U.S. persons from exporting if the U.S. person has reason to believe the foreign recipient of the export may do business with Iraq—whether the export will be substantially transformed is immaterial. The KACRs, on the other hand, give the exporter more comfort. First, the KACRs contain a “safe harbor,” which provides that exports to third countries are not prohibited as long as the exporter has reason to believe that the export will come to rest in a third country for purposes other than reexport to Kuwait.⁶⁰ Second, the KACRs suggest that an exporter will not be liable for exports to third countries that are “substantially transformed or incorporated into manufactured products” even if the finished product is shipped to Kuwait, provided the finished product was not intended for use in Kuwait, the finished product was not specifically manufactured to fill a Kuwaiti order, and the manufacturer's sales are not predominantly to Kuwait.⁶¹ As most other countries have established controls on exports to Iraq and Kuwait, these diversion and reexport issues are not significant at present because few exports are made to Iraq and Kuwait from any country. However, as other countries begin lifting their Iraq/Kuwait controls, these issues will become more important.

In keeping with the U.N. Security Council Resolution 661, the prohibitions on exports makes an exception for foodstuffs and medical supplies.⁶² The regulations provide that specific licenses will be granted to permit exports of foodstuffs and medical supplies to Iraq and Kuwait only in accordance with U.N. Security Council Resolutions 661 and 666.⁶³ Resolution 666 provides for procedures whereby the Security Council determines when certain humanitarian circumstances have arisen and that, in such case, foodstuffs are to be provided to Iraq and Kuwait through the United Nations in cooperation with appropriate humanitarian agencies and distributed by those agencies or under their supervision.

iii. Enforcement of the Trade Embargo. The U.S. Customs Service has the responsibility of enforcement of U.S. trade restrictions. Customs has been active in conducting criminal investigations involving attempts to circumvent the trade embargo against Iraq. To date, Customs has identified attempts by the

transshipment or transit goods intended or destined for Iraq or Kuwait. ISRs § 575.409(a); KACRs § 570.409(a).

59. KACRs § 570.411(a); ISRs § 575.411.

60. KACRs § 570.412(b).

61. *See id.* § 570.411(a).

62. *See* KACRs § 570.205; ISRs § 575.205.

63. KACRs § 570.520; ISRs § 575.520.

Iraqis to import chemical warfare precursors, foodstuffs, gas masks and protective clothing, ground-to-air and air-to-air missiles, missile technology, radar systems and parts, and water purification chemicals and systems.⁶⁴

In addition to conducting criminal investigations Customs has effected over seventy seizures of goods destined for Iraq or Kuwait; the value of the goods seized is nearly \$10,000,000.⁶⁵ Goods seized include air conditioners and spare parts, aircraft spare parts, automobile spare parts, gas turbine engine spare parts, jet aviation fuel, lubricants, and tires.⁶⁶

c. Prohibition of Certain Transactions

Lastly, the ISRs and the KACRs contain a series of prohibitions of other transactions. The regulations prohibit:

- U.S. persons from dealing in property of Iraqi or Kuwaiti origin exported from Iraq or Kuwait after August 6, 1990, or property intended for exportation from Iraq or Kuwait to any country, or exportation to Iraq or Kuwait from any country; U.S. persons are also forbidden from engaging in any activity that promotes or is intended to promote such dealing;⁶⁷
- U.S. persons from engaging in any transaction relating to travel by a U.S. citizen or permanent resident alien to or within Iraq or Kuwait after the effective date, August 9, 1990, except for travel relating to departures from Iraq, official Government or U.N. business, or journalistic activity;⁶⁸
- transactions by U.S. persons relating to transportation to or from Iraq or Kuwait, the provision of transportation to or from the United States by Iraqi or Kuwaiti persons, or the sale within the United States by persons holding authority under the Federal Aviation Act of 1958⁶⁹ of transportation by air that includes a stop in Iraq or Kuwait;⁷⁰
- the performance by U.S. persons "of any contract, including a financing contract, in support of an industrial, commercial, public utility, or Governmental project in [Iraq/Kuwait];"⁷¹
- U.S. persons to "commit or transfer, direct or indirect, funds or other financial or economic resources to the Government of [Iraq/Kuwait] or any

64. Prepared remarks of John Kelley, Jr., Director, Strategic Investigations Division, U.S. Customs Service, presented to the U.S. House of Representatives Committee on Energy and Commerce, Subcommittee on Commerce, Consumer Protection and Competitiveness, February 21, 1991.

65. *Id.*

66. *Id.*

67. ISRs §§ 575.206. Note that the effect of this prohibition is very similar to that of the freeze of assets. Compare *supra* notes 32–48 and accompanying text.

68. KACRs § 570.207. The regulations provide a definition of "journalist." KACRs § 570.416; ISRs § 575.416.

69. 49 U.S.C. §§ 1301–04.

70. KACRs § 570.208; ISRs § 575.208.

71. KACRs § 570.209; ISRs § 575.209.

other person in [Iraq/Kuwait]'';⁷² this prohibition applies to the renewal of credits or loans that took effect prior to the effective date, August 9, 1990;⁷³

- transactions that have the purpose or effect of evading or avoiding, or that facilitate the evasion or avoidance of, the prohibitions of the regulations; also prohibited are attempts and conspiracies to violate the prohibitions.⁷⁴

2. *Penalties*

As part of the Iraq Sanctions Act of 1990,⁷⁵ Congress provided for penalties for violations of the ISRs and the KACRs over and above those provided for in IEPA and the U.N. Act.⁷⁶ Thus, any violation, evasion, or attempted violation or evasion of the regulations may subject the perpetrator to a fine of \$250,000.⁷⁷ A person other than a natural person who is convicted of a willful violation or evasion, or of an attempted violation or evasion, may be subject to a fine of not more than \$1,000,000.⁷⁸ A natural person convicted of a willful violation or evasion, or of an attempted violation or evasion, may be subject to a fine of not more than \$1,000,000, imprisonment for more than twelve years, or both.⁷⁹ An officer, director, or agent of any corporation who knowingly participates in a violation, evasion, or attempted violation or evasion may be subject to the aforementioned fine, imprisonment, or both.⁸⁰

3. *Scope Issues*

In analyzing the scope of the sanctions, it is useful to explore certain jurisdictional concepts employed by the regulations. Furthermore, it is useful to evaluate these concepts in the context of earlier sanctions. While the sanctions will clearly have their desired effect of foreclosing prospective business between the United States and Iraq, it is noteworthy that the reach of the regulations is not as expansive as the reach asserted in earlier sanctions.

Because most other countries have established similar sanctions, it presently would be of little benefit to attempt to conduct prohibited transactions outside the jurisdictional scope of U.S. sanctions. However, these scope issues will grow in importance as other countries begin disassembling their sanctions programs.

72. KACRs § 570.210; ISRs 575.210.

73. KACRs § 570.406(a); ISRs § 575.406.

74. KACRs § 570.211; ISRs § 575.211.

75. See *infra* notes 112–25 and accompanying text.

76. See *supra* notes 15–22 and accompanying text.

77. KACRs § 570.701; ISRs § 575.701.

78. *Id.*

79. *Id.*

80. *Id.* As indicated in the regulations, the provisions of the U.N. Act section that provide for the forfeiture of assets used in the course of a violation, 22 U.S.C. § 287c(b), remain applicable. See KACRs § 570.701(b) (56 Fed. Reg. 5352 (1991)); ISRs § 575.701(b).

a. "U.S. Person"

Aside from the embargo provisions, the regulations control only transactions conducted by "U.S. persons." As indicated earlier, a "U.S. person" is defined as "any United States citizen; permanent resident alien; juridical person organized under the laws of the United States or any jurisdiction within the United States, including foreign branches; or any person in the United States."⁸¹ Importantly, the definition of "U.S. person" contemplates foreign branches of U.S. corporations, but not foreign companies owned by U.S. persons, for example, foreign subsidiaries of U.S. corporations.

In employing the jurisdictional concept of the "U.S. person," the sanctions are consistent with the recent U.S. policy of limiting the extraterritorial reach of economic sanctions. Earlier sanctions such as the Foreign Assets Control Regulations generally applied to transactions conducted by "persons subject to the jurisdiction of the United States," defined to include foreign corporations owned or controlled by U.S. citizens, U.S. business entities, and persons within the United States.⁸² The asserted jurisdiction by the United States over foreign subsidiaries of U.S. corporations has been a source of considerable controversy.⁸³

Interestingly, the sanctions trade embargo provisions, the prohibitions on imports from Iraq and Kuwait and exports to Iraq and Kuwait, are not limited by the "U.S. person" concept. As indicated above, the export prohibitions govern any exports "subject to U.S. jurisdiction."⁸⁴ Accordingly, these provisions could be interpreted to extend to the full measure of U.S. extraterritorial jurisdiction, which historically has been considered to reach foreign U.S.-owned companies.⁸⁵ Thus, the sanctions could be interpreted to prohibit, for example, an export to Iraq by a foreign subsidiary of a U.S. corporation.

b. "Government of Iraq/Kuwait"

Earlier sanctions blocked property of both the government of the sanctioned country and nationals of that country.⁸⁶ The Iraq/Kuwait sanctions freeze of assets, however, applies only to property and interests in property of the "Government of Iraq" and the "Government of Kuwait," both of which are defined very broadly to include any entity under government control.⁸⁷ The scope of the

81. *Supra* note 33.

82. 31 C.F.R. § 500.329 (1990).

83. See, e.g., Moyer & Mabrey, *Export Controls as Instruments of Foreign Policy: The History, Legal Issues, and Policy Lessons in Three Recent Cases*, 15 LAW & POL'Y INT'L BUS. 1 (1983). Even U.S. sanctions that employ the "U.S. person" jurisdictional limit have precipitated controversies relating to extraterritoriality. See M. MALLOY, *supra* note 7, at 616-20 (describing Libyan Arab Foreign Bank v. Bankers Trust Co., [1988] 1 Lloyd's L. Rep. 259).

84. See *supra* notes 53-57 and accompanying text.

85. See, e.g., RESTATEMENT (THIRD), *supra* note 56, §§ 403(1), 414.

86. E.g., 31 C.F.R. § 500.201 (1990) (Foreign Assets Control Regulations).

87. See *supra* note 32 and accompanying text. Similarly, the Libyan Sanctions Regulations asset freeze is limited to property of the "Government of Libya." 31 C.F.R. § 550.289 (1990).

Government of Iraq and the Government of Kuwait is also germane to the export prohibitions, which prohibit exports not only to the target countries but also to entities owned or controlled by these Governments.

The limitation on the freeze of assets to property of the Government of Iraq is probably of little consequence. Because of the breadth of the definition of the Government of Iraq and statist policies of the Iraqi Government, virtually any Iraqi entity with which a U.S. person would trade would be included within the sanctions' definition of the government.⁸⁸ This is especially true in light of the U.S. intention to withhold from Iraq the benefits of trade with the United States to the greatest extent possible.

The limitation on the asset freeze to property of the Government of Kuwait and the prohibition on exports to government-controlled entities are administered in light of the U.S. policy of permitting transactions with Kuwaiti entities to the extent that no benefit will accrue to the Hussein regime in Iraq. OFAC does appear to consider the recognized Kuwaiti Government in exile to be the "Government of Kuwait" for the purposes of the KACRs. However, OFAC will grant blanket authority for transactions with an entity controlled by the Kuwaiti Government after ensuring that the entity is not controlled by the Government of Iraq. Note again, however, that the limitation on the scope of the sanctions to the "Government of [Iraq/Kuwait]" generally applies only to the asset freeze; most of the other prohibitions are not so limited.

4. *Licenses and Licensing Policy*

OFAC generally authorizes transactions that would otherwise be subject to sanctions prohibitions through general and specific licenses. General licenses authorize categories of transactions and are included in the text of the ISRs and the KACRs. Specific licenses are issued by OFAC upon application to cover identified sets of facts.⁸⁹ While specific licenses are ordinarily issued to cover particular transactions or sets of transactions, OFAC has begun issuing unusually broad specific licenses under the KACRs to permit business between U.S. persons and Kuwaiti entities to the extent that no benefit will accrue to Iraq. Generally, a license for a transaction authorizes any other transaction which is

88. To facilitate identification of Iraqi fronts and agents attempting to circumvent the embargo, OFAC has the authority to publicly identify or "specially designate," any person who is directly or indirectly owned or controlled by the Government of Iraq or who has acted for or on its behalf. See Prepared Remarks, R. Newcomb, OFAC, *supra* note 34. A Specially Designated National (SDN) of the Iraqi Government is a representative, agent, front, etc. located outside of Iraq that functions as an extension of the Government of Iraq. *Id.* Since the Iraqi Government tends to operate its international fronts as interlocking networks of companies and key individuals, it is important to realize that under this program any identified Iraqi SDN is by definition the "Government of Iraq." *Id.*

89. The regulations distinguish between general and specific licenses largely on the simple basis of whether or not they appear in the regulations, general licenses being those that do so appear and specific licenses being those that do not. See KACRs §§ 570.305, 570.316; ISRs §§ 575.305, 575.316.

“ordinarily incident” to the licensed transaction and “necessary to give effect thereto.”⁹⁰

Just as the two sets of regulations are facially similar in most other respects, the provisions on licenses and licensing are similar, and the ISRs include most of the same types of general licenses included in the KACRs. However, the different policies that underlie the two sets of regulations will become apparent in the implementation of licensing policies for each. Accordingly, it is likely that OFAC will interpret the general licenses of the ISRs more narrowly than those of the KACRs and be far less likely to grant specific licenses for transactions relating to Iraq than for those relating to Kuwait.

a. General Licenses and Statements of Licensing Policy

The ISRs and the KACRs include (1) general licenses for certain financial transactions relating to Iraqi and Kuwaiti entities; (2) general licenses and statements of licensing policy relating to certain import/export transactions with Iraqi and Kuwaiti entities; and (3) a miscellaneous set of general licenses and statements of licensing policy for various other types of transactions relating to Iraq and Kuwait. The general licenses provide all authority necessary to perform a transaction, but they sometimes require the parties to a transaction covered by the license to fulfill certain reporting requirements. The statements of licensing policy convey a willingness to consider issuing specific licenses to cover identified types of transactions on a case-by-case basis.

i. General Licenses for Certain Financial Transactions. A group of general licenses permit financial transactions, otherwise prohibited by the assets freeze provisions, that concern assets belonging to the Governments of Iraq and Kuwait, that is, the Iraqi Government and the exiled Kuwaiti Government and entities under their control. General licenses applying specifically to assets of these governments are necessary because the assets freeze provisions apply only to assets in which the Governments of Iraq or Kuwait hold an interest.

The principal general licenses in this regard permit the payment of funds or the transfer of credits or other assets into blocked accounts in the names of the Government of Iraq or Government of Kuwait.⁹¹ A transfer can be made under these licenses from a blocked account provided such a transfer does not represent, directly or indirectly, a transfer of an interest from the Government of Iraq or Kuwait to another person. Thus, the licenses do not authorize transfers from

90. See KACRs § 570.418; ISRs § 575.418. A license for a transaction does not authorize an associated debit to a blocked account or an associated transaction with a “blocked person,” an individual or entity controlled by the Government of Kuwait that has not obtained an operating license. *Id.*; KACRs app. A (see *infra* note 110).

91. KACRs § 570.503; ISRs § 575.503. Further requirements must be met for payments by issuing or confirming banks under standby letters of credit in favor of Iraqi or Kuwaiti beneficiaries. See KACRs § 570.518; ISRs § 575.518.

one blocked account into another blocked account held under a different name. Also, these licenses do not authorize a transfer of credit that is an integral part of a transaction that itself must be licensed. The KACRs provision, section 570.503, operates in tandem with section 570.512 of the KACRs, which authorizes U.S. financial institutions to invest and reinvest Government of Kuwait funds held in blocked accounts.⁹²

A set of three general licenses permit the completion of certain transactions provided the transactions were initiated before the effective date of the assets freeze, August 2, 1990. These licenses authorize (1) U.S. financial institutions to complete foreign exchange, securities, and commodities transactions with or on behalf of the Government of Kuwait in connection with contracts executed before the effective date (not in the ISRs);⁹³ (2) persons other than the Governments of Iraq or Kuwait to buy, sell, or satisfy obligations on bankers acceptances, and to pay under deferred payment undertakings, for example, letters of credit, that involve an interest of the Government of Iraq or Government of Kuwait provided the obligation arose before the effective date;⁹⁴ and (3) payments to U.S. persons on obligations of the Government of Iraq or Government of Kuwait provided the obligation arose before the effective date.⁹⁵

ii. General Licenses and Statements of Licensing Policy for Certain Import/Export Transactions. The ISRs and the KACRs contain general licenses authorizing certain exports such as baggage shipments,⁹⁶ shipments to Government personnel,⁹⁷ shipments for official U.N. business,⁹⁸ and imports for diplomatic or support personnel of the Government of Iraq or the reorganized Government of Kuwait.⁹⁹ The regulations also provide that specific licenses will be issued on a case-by-case basis to permit exports to Iraq and Kuwait of donated food and medical supplies. In accordance with U.N. Security Council Resolution 666, these licenses for humanitarian exports will generally be

92. The analogous ISRs provision that permits certain transfers into blocked accounts, section 575.503, similarly refers to an ISRs § 575.512, but the ISRs do not contain such a section.

93. KACRs § 570.504. Assets to be paid to the Government of Kuwait must be placed in a blocked account. *Id.*

94. KACRs § 570.505(a); ISRs § 575.505(a). Persons other than the Governments of Iraq or Kuwait are authorized to complete the same types of transactions in connection with imports and exports to and from Iraq or Kuwait that do not involve an interest of the Governments of Iraq or Kuwait provided the bankers acceptances or the deferred payment undertakings were accepted before the effective date. KACRs § 570.505(b); ISRs § 575.505(b).

95. KACRs § 570.506; ISRs § 575.506. The license does not authorize payments from blocked accounts. *Id.* The ISRs § 575.506(c) contains a provision, not included in the KACRs § 570.506, requiring that notice be provided to OFAC of transactions made under this general license.

96. KACRs § 570.507(a)(1); ISRs § 575.507(a)(1). These transactions must qualify under Export Administration regulations General License BAGGAGE, 15 C.F.R. § 771.6 (1990).

97. KACRs § 570.507(a)(1), ISRs § 575.507(a)(1). These transactions must qualify under Export Administration regulations General License GUS, 15 C.F.R. § 771.13 (1990).

98. KACRs § 570.507(a)(2); ISRs § 575.507(a)(2).

99. KACRs § 570.519; ISRs § 575.519.

granted only for shipments through the Red Cross or other appropriate humanitarian agencies.¹⁰⁰

As with the general licenses relating to financial transactions, there are provisions in the regulations relating to uncompleted import and export transactions that were initiated before the effective dates of the embargo prohibitions, August 2, 1990 (ISRs) and August 9, 1990 (KACRs). Specific licenses will be granted to permit payment by U.S. financial institutions under irrevocable letters of credit¹⁰¹ for exports to Iraq or Kuwait or to third countries for entities operated from Iraq or Kuwait, provided the export occurred before the effective date or, if it was after the effective date, an effort was made to prevent delivery.¹⁰² Also, with respect to export transactions initiated before the effective date, procedures are provided for the retrieval of goods seized before exportation.¹⁰³

iii. Miscellaneous General Licenses and Statements of Licensing Policy.

Both the ISRs and the KACRs authorize certain transactions relating to telecommunications¹⁰⁴ and the transmission of mail¹⁰⁵ between the United States, and Iraq and Kuwait. The KACRs also authorize transactions relating to the registration and renewal of Kuwaiti intellectual property rights,¹⁰⁶ and provide that specific licenses will be issued to permit payment to U.S. persons for the provision of professional services.¹⁰⁷ These provisions are not contained in the ISRs.

b. Specific Licenses

In conformity with U.S. and U.N. policy to sever Iraq from the world economy, OFAC will probably issue very few specific licenses under the ISRs. In marked contrast, OFAC has and will continue to license all transactions with Kuwaiti entities provided it is confident that the subject transaction will not generate a benefit to Iraq. This policy typically entails authorizing transactions conducted by Government-owned or controlled Kuwaiti entities that would otherwise be prohibited by the KACRs asset freeze or export prohibition.¹⁰⁸

In this regard, OFAC has begun issuing to Kuwaiti entities unusually broad specific licenses under the KACRs, which cover categories and types of trans-

100. KACRs §§ 570.520, 570.521; ISRs §§ 575.520, 575.5221.

101. The KACRs refer more generally to payment under "a financing arrangement requiring payment by a U.S. financial institution." KACRs § 570.510(a); cf. ISRs § 575.510(a).

102. KACRs § 570.510(a)(2); ISRs § 575.510(a)(2).

103. KACRs § 570.517; ISRs § 575.517.

104. KACRs § 570.513; ISRs § 575.513.

105. KACRs § 570.514; ISRs § 575.514.

106. KACRs § 570.516.

107. *Id.* § 570.515.

108. The assets freeze prohibits transactions that concern property of the "Government of Kuwait," which is defined broadly to include entities owned or controlled by the Kuwaiti Government. See KACRs §§ 570.201, 570.307. Likewise, the export prohibition proscribes exports to the Government of Kuwait and entities under its ownership or control. *Id.* § 570.205.

actions.¹⁰⁹ A subset of these broad specific licenses, new to OFAC licensing practices, are called "operating licenses." OFAC began issuing operating licenses to Government-owned or controlled Kuwaiti entities in the United States to permit them to continue business operations.¹¹⁰ Operating licenses authorize transactions with U.S. persons, sometimes under restrictions such as reporting requirements. Kuwaiti-controlled entities that hold operating licenses are free to transact with each other.¹¹¹

c. Iraq Sanctions Act of 1990

On November 5, 1990, the President signed into law the congressional input on sanctions against Iraq: The Iraq Sanctions Act of 1990 (the Sanctions Act).¹¹² As opposed to the regulations, which are directed at private activity, the Sanctions Act is intended primarily to ensure that agencies of the federal Government do not take actions that benefit Iraq. Identified as supplementary to the administration's measures, the Sanctions Act's sanctions include:

- a prohibition on foreign military sales under the Arms Export Control Act;¹¹³
- a prohibition on the issuance of State Department export licenses for exports of United States Munitions List items to Iraq;¹¹⁴
- a directive to prohibit exports to Iraq of goods and technology controlled under the Export Administration Act of 1979;¹¹⁵
- a directive to prohibit the export and distribution of nuclear equipment, materials, and technology controlled under the Atomic Energy Act of 1954

109. Acting under a broad specific license of this type, the exiled Kuwaiti Government recently initiated an acquisition program to facilitate the post-restoration reconstruction of Kuwait's infrastructure, which has been damaged by the Iraqi occupation. *See* Daily Report for Executives (BNA), Jan. 18, 1991, at A-14.

110. The KACRs contain an appendix that provides guidance on what Kuwaiti entities held operating licenses at the time the KACRs were issued (November 30, 1990). The appendix lists Kuwaiti entities in three categories. Entities in the first category, "Controlled/Blocked," are considered to be controlled by the Government of Kuwait and/or the Government of Iraq and blocked. The KACRs prohibitions apply to these entities. The second category, "Controlled/Licensed to Operate," contains entities that are controlled by the recognized Kuwaiti Government in exile but hold operating licenses. Entities in the last category, "Not Controlled/No Restrictions," are considered to be free from Government control.

111. KACRs § 570.417.

112. The Sanctions Act was passed as §§ 586-586(j) of the Foreign Operations Authorization and Appropriation Act of 1990, Pub. L. No. 101-513, 104 Stat. 1979, 2047-55 (1990). Other bills have been introduced in Congress to punish foreign companies that violate the sanctions as mandated by U.N. Security Council Resolution 661. *See* Daily Report for Executives (BNA), Jan. 7, 1991, at A-1.

113. Sanctions Act § 586G(a)(1). The Arms Export Control Act is codified, as amended, at 22 U.S.C. §§ 2751-2796d.

114. Sanctions Act § 586G(a)(2). The United States Munitions List, 22 C.F.R. pt. 121, consists of those items designated by the President as defense articles and defense services. *See* 22 U.S.C. § 2778.

115. Sanctions Act § 586G(a)(3). The Export Administration Act of 1979 is codified, as amended, at 50 U.S.C. app. §§ 2401-2420.

and to prohibit the issuance of specific authorizations under section 57b(2) of the Atomic Energy Act;¹¹⁶

- a requirement that the United States shall oppose loans or financial assistance to Iraq by international financial institutions (for example, the International Monetary Fund and the World Bank) in which the United States participates;¹¹⁷
- a prohibition on the issuance of credits and credit guarantees through the Import-Export Bank to Iraq;¹¹⁸
- a prohibition on Commodity Credit Corporation assistance to Iraq;¹¹⁹
- a general prohibition on foreign aid to Iraq under the Foreign Assistance Act of 1961 and the Arms Export Control Act.¹²⁰

The Sanctions Act also identifies Iraq as “a country which has repeatedly provided support for acts of international terrorism.”¹²¹ This identification implicates other statutes that authorize sanctions including section 40 of the Arms Export Control Act,¹²² section 620A of the Foreign Assistance Act of 1961,¹²³ and section 555 of the International Security and Development Act of 1985.¹²⁴

The Sanctions Act also contains provisions that relate to the administration’s sanctions. First, the Act requires the President to notify Congress at least fifteen days prior to termination of any sanction. Second, the Act defines the exemption under the regulations for transactions involving foodstuffs or payments for foodstuffs “in humanitarian circumstances” to include only those transactions consistent with U.N. Resolution 666 and other relevant Security Council resolutions. Lastly, as indicated earlier, the Sanctions Act mandates stiffer penalties for violations of the regulations than those provided for by IEEPA and the U.N. Act.¹²⁵

116. Sanctions Act § 586G(a)(4). The Atomic Energy Act of 1954 is codified, as amended, at 42 U.S.C. §§ 2011–2296. Section 57b(2) of this Act requires the Secretary of Energy to determine that production of special nuclear material outside of the United States will not be inimical to the interest of the United States before the Secretary can authorize such production.

117. Sanctions Act § 586G(a)(5).

118. *Id.* § 586G(a)(6).

119. *Id.* § 586G(a)(7).

120. *Id.* § 586G(a)(8). The Foreign Assistance Act of 1961 is codified, as amended, at 22 U.S.C. §§ 2151–2496.

121. Sanctions Act § 586F(c).

122. *See supra* note 113.

123. Section 620A of the Foreign Assistance Act of 1961 is codified at 22 U.S.C. § 2371. This section prohibits the provision of assistance under the Foreign Assistance Act of 1961, the Agricultural Trade Development and Assistance Act of 1954, the Peace Corps Act or the Export-Import Act of 1945 to any country determined to have repeatedly provided support for acts of international terrorism.

124. Section 555 of the International Security and Development Act of 1985 states that it is the sense of the Congress that the President should seek to effect an international boycott of countries that have been determined to have supported international terrorism.

125. Sanctions Act § 586E.

IV. Economic Implications of the Iraq/Kuwait Sanctions

A. EFFECT OF SANCTIONS ON BUSINESS WITH IRAQ AND KUWAIT

1. *Prospective Effect*

The Iraq/Kuwait sanctions are intended to prohibit transactions by U.S. persons that could benefit the Hussein regime in Iraq. The sanctions are comprehensive in effecting this purpose. In particular, they virtually foreclose the possibility of conducting business with entities in Iraq. The sanctions are not intended to prohibit business with legitimate Kuwaiti entities, that is, those not controlled by the Government of Iraq. Accordingly, the regulations and OFAC licensing policies serve to facilitate business activity between United States persons and legitimate Kuwaiti entities.

2. *Effect of Sanctions on Preexisting Contractual Rights and Obligations*

As a general rule, the sanctions prohibit the performance of proscribed transactions as of the effective date of the prohibitions.¹²⁶ Absent authorization, it is immaterial that contractual rights and obligations preexisted the sanctions. For example, the sanctions generally prohibit payments by U.S. banks under a confirming letter of credit established to facilitate payment for a shipment of goods to an entity controlled by the Government of Iraq or Government of Kuwait despite the fact that the export was completed before the Iraqi invasion.¹²⁷

B. EXCUSE FOR NONPERFORMANCE OF CONTRACTS

That a contract party is prevented from performing contractual obligations by the Iraq/Kuwait sanctions does not necessarily mean that the party will be civilly liable for breach of contract. Statutory excuse provisions and common law doctrines may excuse nonperformance.

1. *IEEPA Section 2*

Section 2 of IEEPA provides:

Compliance with any regulation, instruction, or direction issued under this chapter shall to the extent thereof be a full acquittance and discharge for all purposes of the obligation of the person making the same. No person shall be held liable in any court for or with respect to anything done or omitted in good faith in connection with the administration of, or pursuant to and in reliance on, this chapter, or any regulation, instruction, or direction issued under this chapter.¹²⁸

126. The effective dates of the prohibitions are identified at KACRs § 570.212 and ISRs § 575.212.

127. Payment would violate the asset freeze provisions of the regulations. The regulations do, however, contain a general license that would permit payment to the exporter provided no debit is made to a blocked account. KACRs § 570.506; ISRs § 575.506.

128. 50 U.S.C. § 1702(a)(3).

The clear intent of this provision is to relieve a contract party of all obligations to perform in the event that performance is prohibited by a presidential edict issued pursuant to IEEPA. As is plainly stated, a contract party shall not be liable in any court¹²⁹ for good faith compliance with an IEEPA order. It remains true, however, that this provision is only applicable to U.S. courts; IEEPA section 2 alone will not suffice to excuse a party for nonperformance in a foreign court or arbitral panel that is interpreting other than U.S. law. In such an instance, the party may seek recourse to the excuse doctrine of force majeure.

2. Force Majeure

Force majeure is defined as "superior or irresistible force."¹³⁰ Force majeure clauses are common in export-import contracts because "in international trade extraordinary obstacles to performance (such as war, Governmental intervention of various kinds, currency fluctuations, and the like) are apt to present greater hazards than in domestic transactions."¹³¹ The elements of force majeure have been stated as follows: "First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable."¹³²

Because most countries have acted on the U.N. mandate and established sanctions that bar business with Iraq and Kuwait, it is likely that a foreign tribunal would recognize the international sanctions as activating a standard force majeure contract clause.¹³³ However, whether force majeure would be recog-

129. Section 1702(a)(3) speaks in terms of persons not being liable in *any* court, rather than speaking specifically to the jurisdiction of U.S. courts. Despite this language, Congress surely could not have intended this provision to represent an asserted extension of its power to determine judicial jurisdiction to the courts of other sovereign nations.

130. BLACK'S LAW DICTIONARY 581 (5th ed. 1979).

131. Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413, 1415 (1963). Excuse provisions are located in the Uniform Commercial Code § 2-615(a), and the U.N. Convention on Contracts for the International Sale of Goods (CISG) art. 79(1). Note that the CISG will preempt domestic law and apply to a covered contract unless the contract expressly provides that the CISG is inapplicable.

132. *Transatlantic Financing Corp. v. United States*, 363 F.2d 312, 315 (D.C. Cir. 1966) (footnote omitted).

133. At least one court has indicated that regulations issued under the authority of IEEPA may be sufficient to activate a contractual force majeure clause. *See Itel Corp. v. First Nat'l Bank*, 566 F. Supp. 1210, 1217-18 (D. Mass. 1983). Note, however, that force majeure is unlikely to be recognized unless the party asserting force majeure has applied for a specific license from OFAC to cover the transactions necessary to perform the subject contract. Also, the force majeure issue could be complicated by nonconformity between U.S. sanctions and those of other countries. While sanctions relating to Iraq and Kuwait are mandated by U.N. Security Council Resolution 661, different countries will interpret the resolution differently, and countries will disassemble their sanctions differently once the sanctions are no longer mandated. Thus, for example, a foreign branch of a U.S. firm could be covered by a U.S. sanctions prohibition that is not maintained by the host country. A host country court could refuse to recognize force majeure on the basis that the U.S. prohibition is an illegal assertion of extraterritorial jurisdiction. *Cf. Freuhauf Corp. v. Massardy*, [1968] D.S. Jur.

nized depends on a variety of factors including the terms of the subject contract, the controlling law on force majeure, and the strength of the applicable country sanctions. It should be recognized that force majeure has been held not to apply in international arbitration proceedings concerning limited U.S. sanctions measures.¹³⁴

C. CLAIMS AGAINST THE GOVERNMENT OF IRAQ

Many U.S. companies presently hold claims against the Iraqi Government arising from its invasion and occupation of Kuwait. It appears that the U.S. Government may be developing plans for consolidated procedures to adjudicate these claims, possibly modeled on the Iran-United States Claims Tribunal established after the Iranian hostage crisis pursuant to which U.S. claims have been satisfied from a pool of frozen Iranian assets.¹³⁵ In this regard, OFAC has conducted a census of claims by U.S. persons against the Government of Iraq.¹³⁶

V. Conclusion

As an addition to the series of U.S. emergency economic sanctions, the Iraq/Kuwait sanctions contain both conventional and unprecedented components. The ISRs constitute punitive sanctions in a comprehensive state—they are intended to disrupt economic intercourse between the United States and Iraq almost to the greatest extent possible.

With the KACRs, however, the United States has established sanctions prohibitions for an unusual purpose: to protect the assets of a foreign country. While the KACRs employ the same tools and have the same appearance as standard U.S. sanctions regulations, the reader must be prepared to approach them in light of the policies they implement. Thus, for example, the specific license is used as a broader instrument to authorize categories of transactions. Such broad specific licenses should be used as authority for a range of transactions much like general licenses.

147, [1965] J.C.P. II 14274 bis, [1965] Gaz. Pal. (French Government forced French subsidiary of U.S. corporation to take actions in performance of a contract, which actions were in violation of U.S. economic sanctions against the People's Republic of China).

134. See *National Oil Corp. v. Libyan Sun Oil Co.*, 29 I.L.M. 565 (first arbitral award: force majeure issue) (force majeure clause of oil exploration contract to which Libyan law applied was not activated by (1) revocation of U.S. passport rights for travel to and in Libya, and (2) new U.S. regulation controlling exports to Libya of products and technical data relating to oil exploration), 29 I.L.M. 601 (final arbitral award: remaining issues), 733 F. Supp. 800 (D. Del. 1990) (judgment confirming arbitral awards).

135. See generally Stewart & Sherman, *Developments at the Iran-United States Claims Tribunal: 1981-1983*, 24 VA. J. INT'L L. 1 (1983). There has been much speculation on whether the pool of frozen assets of the Government of Iraq would be large enough to satisfy all legitimate claims against the Iraqi Government. See, e.g., Daily Report for Executives (BNA), Feb. 11, 1991, at A-8. These assets have been valued at approximately \$1 billion by OFAC. Prepared Remarks, R. Newcomb, OFAC, *supra* note 34.

136. See 56 Fed. Reg. 5636-41 (1991).

Finally, unlike earlier sets of sanctions, the Iraq/Kuwait sanctions are an integrated part of a coordinated multilateral effort. Therefore, unlike some earlier sanctions, the Iraq/Kuwait sanctions are likely to be quite effective. With the end of the Cold War, which usually scuttled earlier efforts to establish multilateral sanctions programs, the Iraq/Kuwait program may be the blueprint for future sanctions programs to address international aggression.